



California Fair Political Practices Commission

September 29, 1988

Jonathan P. Lowell
Assistant City Attorney
City of Livermore
1052 S. Livermore Ave.
Livermore, CA 94550

Re: Your Request for Advice
Our File No. I-88-270

Dear Mr. Lowell:

You have written seeking advice regarding possible disqualification obligations of Livermore Planning Commission member James Perry under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} Your letter states only a general question; it does not request advice about a specific pending decision. Therefore, we consider your letter a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).^{2/}

QUESTION

Must Mr. Perry disqualify himself regarding planning commission decisions where the real estate broker under whose auspices he works appears before the planning commission either as: (1) a developer on his own; (2) a real estate broker representing a client of the firm where Mr. Perry is employed; or (3) a real estate broker representing a client of another firm in which the broker is also a principal?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

CONCLUSION

Mr. Perry must disqualify himself regarding any planning commission decision which will have a reasonably foreseeable material financial effect on his broker-employer, his brokerage firm, or on his broker-employer's other brokerage firm.

FACTS

Mr. Perry is a member of the Livermore Planning Commission. As such, he frequently participates in decisions involving land use changes such as general plan amendments, zoning variances, use permits, subdivision maps, etc.

Mr. Perry is employed by Red Carpet Real Estate in Livermore. Mr. Perry is both a real estate agent and the manager of that office. As manager he is responsible for overseeing the operations of the business and supervising other real estate agents. Pursuant to Business and Professions Code Section 10137, Mr. Perry is licensed as a real estate salesperson under a real estate broker, Mr. Daniel Spruiell, who is the local Red Carpet Realty franchisee.

Occasionally, Mr. Spruiell appears before the Planning Commission representing either: 1) himself, as a developer; 2) clients of Red Carpet Real Estate; or 3) clients of a separate business entity, SMD Realty, Inc., of which Mr. Spruiell is an officer and a major shareholder.

SMD Realty, Inc., is a California closely held corporation. Its principal shareholders are Mr. Spruiell and his father. Mr. Spruiell serves as president of the corporation. SMD Realty, Inc., provides the usual real estate services associated with a real estate office and, as with Red Carpet Real Estate, Mr. Spruiell is the real estate broker under whose license the corporation operates. In addition, SMD Realty, Inc., provides consulting services in connection with real estate development, e.g., financing, design, obtaining governmental permits and other approvals, etc.

ANALYSIS

The Act prohibits a public official from making, participating in, or using his official position to influence a governmental decision in which he has a financial interest. (Section 87100.) An official has a financial interest in a decision if it will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public

generally, on the official or a member of his immediate family, or on:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87100(c) and (d)

Mr. Perry is an officer and employee of Red Carpet Real Estate ("Red Carpet"). Red Carpet is also a source of income to Mr. Perry, as is Mr. Spruiell, his broker. (Regulation 18704.3(c)(3), copy enclosed.) Therefore, both Red Carpet and Mr. Spruiell are economic interests of Mr. Perry's. Consequently, he must disqualify himself if a decision will have a reasonably foreseeable material financial effect on either of them which is distinguishable from the decision's effect on the public generally.

This is true whether or not Mr. Spruiell is acting in his individual capacity as a developer, in his capacity as the broker for Red Carpet, or in his capacity as the broker for SMD Realty, Inc. Since Mr. Spruiell has become a source of income to Mr. Perry, he is a source of income for all purposes, not just when he is appearing on his own behalf or on behalf of Red Carpet or its clients.

In those situations where Mr. Spruiell is representing himself, disqualification is required by Regulation 18702.1(a)(1) (copy enclosed). This would be true even if someone else appeared representing Mr. Spruiell's interests. (Regulation 18702.1(b).)

In those situations in which Mr. Spruiell appears as the representative of Red Carpet, disqualification will be required if the decision will have a reasonably foreseeable material financial effect on either Mr. Spruiell or on Red Carpet. If a real estate commission is involved which will result in Mr. Spruiell receiving \$1,000 or more in commission income or

Jonathan Lowell
September 29, 1988
Page 4

Red Carpet receiving \$10,000 or more in commission income, then Mr. Perry must disqualify himself.^{2/}

When Mr. Spruiell appears in his capacity with SMD Realty, disqualification is required if the decision will affect Mr. Spruiell's commission income by \$1,000 or more or will affect SMD Realty's commission income by \$10,000 or more. (Regulations 18236(b), 18706 and 18702(b)(3).)

Disqualification as to any specific decision will depend on the facts relating to that decision. Should you or Mr. Perry wish advice in the future as to a specific pending decision, please do not hesitate to write again. If you have questions regarding this letter, you may reach me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Kathryn E. Donovan

By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh

Enclosures

^{2/} The \$10,000 figure for Red Carpet is based upon Regulation 18702.2(g), since Red Carpet is presumably a small, privately held business as a franchise owned by Mr. Spruiell. If that is not the fact, then the amount could change.

The \$1,000 figure for an effect on Mr. Spruiell is based upon recently adopted new materiality regulations. These have not yet taken effect, but the figure represents the Commission's determination as to when an effect upon an individual who is a source of income will be considered to be material.

OFFICE OF THE
CITY ATTORNEY

LIVERMORE, CALIFORNIA

THOMAS R. CURRY
City Attorney

JUL 14 8 56 AM '88

July 12, 1988

1052 S. Livermore Ave.
Livermore, California 94550
(415) 449-4018

JONATHAN P. LOWELL
Assistant City Attorney

Mr. John McLean
Office of the General Counsel
Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95804-0814

RE: Request for Advice Letter

Dear Mr. McLean:

I have been authorized by James Perry, a member of the Planning Commission of the City of Livermore, to request an advice letter from you on the situation outlined in this letter.

Since our telephone conversation of last week, I have spoken with Commissioner Perry and have learned more about the terms of his employment. The information he provided me with leads me to the preliminary conclusion that he must disqualify himself from participating in decisions that come before the Planning Commission as discussed below. As you and I have already communicated about this matter and as Mr. Perry would like a more definitive answer to his question, at his direction, I still solicit your advice as to how to respond to the situation below.

Mr. Perry is employed by Red Carpet Real Estate in Livermore. Mr. Perry is both a real estate agent and the manager of that office. As manager he is responsible for overseeing the operations of the business and supervising other real estate agents. Pursuant to Business and Professions Code Section 10137, Mr. Perry is licensed as a real estate salesperson under a real estate broker, Mr. Daniel Spruiell, who is the local Red Carpet Realty franchisee.

As a member of the Planning Commission of the City of Livermore, Mr. Perry frequently participates in decisions involving land use, e.g., General Plan amendments, zoning, variances, use permits, Subdivision Map Act decisions, etc.

Occasionally, Mr. Spruiell appears before the Planning Commission representing either: 1) himself, as a developer, 2) clients of Red Carpet Real Estate, or 3) clients of a separate business entity, SMD Realty, Inc., of which Mr. Spruiell is an officer and a major shareholder.

Clearly, when Mr. Spruiell appears before the Planning Commission in the first two capacities referred to above,

pursuant to Government Code Section 87100 and Cal. Admin. Code Section 18704.3(c)(3), Mr. Perry must, and does, disqualify himself from participating in such governmental decisions as Mr. Spruiell is his source of commission income. It is not so clear, however, how Mr. Perry should proceed when Mr. Spruiell appears before the Commission in the role of a consultant from SMD Realty, Inc., representing development clients.

SMD Realty, Inc., is a California closely held corporation. Its principal share holders are Mr. Spruiell and his father. Mr. Spruiell serves as president of the corporation. SMD Realty, Inc., provides the usual real estate services associated with a real estate office and, as with Red Carpet Real Estate, Mr. Spruiell is the real estate broker under whose license the corporation operates. In addition, SMD Realty, Inc., provides consulting services in connection with real estate development, e.g., financing, design, obtaining governmental permits and other approvals, etc.

The question has arisen as to whether Mr. Perry should disqualify himself from participating in decisions where Mr. Spruiell appears before the Planning Commission in his capacity as a consultant from SMD Realty, Inc., representing development clients in matters not related to Mr. Perry's work with Red Carpet Real Estate. Arguably, when Mr. Spruiell is providing consulting services to clients of SMD Realty, Inc., he is not acting in his capacity as a real estate broker and, therefore, should not be considered a source of commission income to Mr. Perry. On the other hand, it can be argued that SMD Realty, Inc., is simply a corporate veil and should not be used to shield the fact that Mr. Spruiell is the real estate broker under whose auspices Mr. Perry works.

Please provide me with advice on how the above situation should be considered in light of Cal. Admin. Code Section 18704.3(c)(3) and other relevant law in order that I can properly advise Mr. Perry. Your assistance is greatly appreciated. Please give me a call should you require any additional information.

Very truly yours,



JONATHAN P. LOWELL
Assistant City Attorney

JL:gd
cc: Jim Perry

OFFICE OF THE
CITY ATTORNEY
LIVERMORE, CALIFORNIA

THOMAS R. CURRY
City Attorney

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Mr. John McLean
Office of the General Counsel
Fair Political Practices Commission
P.O. Box 807
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Very truly yours,



JONATHAN P. LOWELL
Assistant City Attorney

JL:gd
cc: Jim Perry



California Fair Political Practices Commission

July 15, 1988

Jonathan Lowell
Assistant City Attorney
1052 S. Livermore Avenue
Livermore, CA 94550

Re: 88-270

Dear Mr. Lowell:

Your letter requesting advice under the Political Reform Act was received on July 14, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Robert Leidigh, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
General Counsel

DMG:plh
cc: James Perry